

JURISDICTION IN REM AND THE ATTACHMENT OF INTANGIBLES: EROSION OF THE POWER THEORY

The arid conceptionalism of the power theory of state-court jurisdiction derived from Pennoyer v. Neff is nowhere more prevalent than in the exercise of jurisdiction based upon the attachment of intangible obligations. This comment discusses that vulnerable segment of current jurisdictional law in order to expose the theoretical and constitutional inadequacies of the Pennoyer power theory and its attendant differentiation between jurisdiction in rem and in personam. The comment proceeds by the following steps: first, consideration of the theoretical necessity for the in rem-in personam distinction under the power theory; second, observations on the erosion of the Pennoyer rationale; third, review of the conceptual and constitutional difficulties created by application of the Pennoyer theory to intangibles in Seider v. Roth and Podolsky v. Devinney; and finally, suggestions for a jurisdictional theory of general application founded upon the minimum-contacts approach of International Shoe Company v. Washington.

INTRODUCTION

THE CONCEPTUAL structure of state-court jurisdiction established by Justice Field in *Pennoyer v. Neff*¹ with its inquiry into the "power" or "authority" of the state over a particular person, thing, or intangible continues to dominate the American law of jurisdiction. While the bases for in personam jurisdiction have undergone extensive reevaluation with the advent of *International Shoe Company v. Washington* and the interest analysis approach to personal jurisdiction,² the *Pennoyer* dichotomy of jurisdiction in personam and in rem persists,³ and the questions of fairness to the defendant and reasonableness of the forum which presently predominate the consideration of personal jurisdiction are put aside when the courts turn to jurisdiction in rem. In that sphere the sole jurisdic-

¹ 95 U.S. 714 (1877).

² 326 U.S. 310 (1945). See *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 919-48 (1960) [hereinafter cited as *Developments—Jurisdiction*].

³ See generally A. EHRENZWEIG, CONFLICT OF LAWS §§ 25-33 (1962); H. GOODRICH, CONFLICT OF LAWS §§ 67-79 (4th ed. E. Scoles 1964); G. STUMBERG, CONFLICT OF LAWS 66-107 (3d ed. 1963).

tional question continues to be, "where is the res?"⁴ The inadequacy of that inquiry and the immense theoretical confusion which surrounds it, as exemplified by in rem jurisdiction based on the attachment of intangibles, will be the subject of this comment. *Seider v. Roth*,⁵ is the catalyst responsible for this reevaluation of jurisdiction in rem. That case and the subsequent rejection of its holding by the United States District Court of the Southern District of New York⁶ will be discussed to illustrate how the *Pennoyer* system of concepts has endured, by means of decisional manipulation, beyond the point where it produces or invites bad results. In conclusion it will be urged that the distinction between jurisdiction in rem and in personam be abandoned and that the minimum contacts approach of *International Shoe* be applied in all cases.

THE PENNOYER FORMULATION

In deciding *Pennoyer*, the Supreme Court, speaking through Mr. Justice Field, undertook to present a conceptual system of jurisdiction which would both guarantee the defendant notice of the legal action against him and restrict state-court power to matters properly of local concern.⁷ Notice to the defendant through service of process was deemed essential to due process under the fourteenth amendment.⁸ And since state

⁴ See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 246 (1958). See also A. EHRENZWEIG, *supra* note 3, at 83-85; Andrews, *Situs of Intangibles in Suits Against Non-resident Claimants*, 49 YALE L.J. 241 (1939); Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment, and Taxation*, 31 HARV. L. REV. 905 (1918); *Developments—Jurisdiction*, *supra* note 2.

⁵ 17 N.Y.2d 111, 216 N.E. 312, 269 N.Y.S.2d 99 (1966), noted in 51 MINN. L. REV. 158 (1966) and 19 STAN. L. REV. 654 (1967). See also Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967).

⁶ *Podolsky v. Devinney*, 281 F. Supp. 488 (S.D.N.Y. 1968).

⁷ See generally Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 245-48.

⁸ 95 U.S. at 733-34. Mr. Justice Field determined that due process required that before the defendant could be personally bound by any judgment he must be brought within the court's jurisdiction by personal service of process in the state or by voluntary appearance. In actions against nonresidents, substituted service of process by publication could satisfy due process requirements only when property of the defendant situated in the state was brought under the control of the court and subjected to its disposition. *Id.* In justification, the Court reasoned that the non-resident defendant would be sufficiently informed if his "property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him . . ." *Id.* at 727. For

"power" to serve process could extend only as far as the state boundaries,⁹ the same constitutional precept was also viewed as a territorial limitation on state-court jurisdiction. Due process standards thus dovetailed with the territorial concept of jurisdiction, which rested on the notion that each state within the federal system had independent and exclusive judicial "power" over all persons and property within its territorial limits.¹⁰ Concomitant with this exclusiveness was the limitation that one state's exercise of jurisdiction could not infringe upon the autonomy of a sister state.¹¹ Therefore, the only matters which could be of *proper* local concern were those involving persons or things physically present within the forum state.¹²

an excellent discussion of the notice requirement within the *Pennoyer* decision, see Hazard, *supra* note 7.

⁹ 95 U.S. at 727: "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."

¹⁰ *Id.* at 720, 722. "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." *Id.* at 722.

¹¹ Aversion to unenforceable judgments might well have been the consideration that prompted Justice Field to state that seizure was required to prevent the introduction of "a new element of uncertainty in judicial proceedings." 95 U.S. at 728. See Note, *The Requirement of Seizure in the Exercise of Quasi In Rem Jurisdiction: Pennoyer v. Neff Re-Examined*, 63 HARV. L. REV. 657, 658-59 (1950). Courts seldom enter decrees ordering the performance of affirmative acts outside the forum. See, e.g., *Port Royal R.R. v. Hammond*, 58 Ga. 523 (1877); *Gunter v. Arlington Mills*, 271 Mass. 314, 171 N.E. 486 (1930). This reluctance is based in part on apprehension concerning the alleged inability to enforce the decree as well as interference with the sovereignty of another state. See generally Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 283 (1913); Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494 (1930). But a question remains as to why the ability of the forum state to enforce its judgments should be a consideration in formulating a system of state-court jurisdiction when the Constitution requires that each state give full faith and credit to judgments rendered in the other states. Perhaps the explanation is to be found in the air of mystery and confusion that surrounded the full faith and credit clause during the years after its adoption. See Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 62-71 (1957). Nonetheless, it must be recognized that the principle of exclusive jurisdiction which is the basis of the *Pennoyer* system was admittedly adopted by Justice Field from the body of general principles of the law of jurisdiction of *independent* states, a body of jurisdictional law formulated to exist in the absence of the unifying force of a full faith and credit requirement. See note 12 *infra*.

¹² 95 U.S. at 720. The Court cited its decision in *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850), for the proposition that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every

The principle of *exclusive jurisdiction*¹³ is almost axiomatic when the state in question is the situs of all aspects of an action or, conversely, when it has no contacts with the suit. But when the controversy involves elements affecting more than one state, it is difficult to think of any court as having unitary adjudicative authority. In his attempt to allocate judicial power among the several states, Justice Field no doubt felt that conflicts among the states would be avoided by a system which conferred jurisdiction for all purposes on the state in which the defendant or the res in

other forum . . . an illegitimate assumption of power, and be resisted as mere abuse." 95 U.S. at 720.

The *Pennoyer* opinion proceeded on the premise that, although the several states are not in every respect independent, "principles of public law respecting the jurisdiction of an independent State over persons and property" are applicable to them. *Id.* at 722 (emphasis added). Underpinning this premise were the principles of sovereignty developed by Justice Story in his treatise on conflict of laws. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed. 1841). Thus, Professor Hazard observed: "The basic organization, the intellectual structure, and much of the language of Justice Field's opinion is taken straight from Story, with the consequence that all the logical and practical difficulties implicit in Story's system were translated wholesale into constitutional law." Hazard, *supra* note 7, at 262. As a result, principles of public law respecting the jurisdiction of nations were adopted as the foundation for a system of concepts to solve the jurisdictional problems of the several states within a federal union. *Pennoyer* was not the first judicial application of the general principles of territorial sovereignty. Justice Story, in a decision which predated his treatise, had said that "a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory." *Picquet v. Swan*, 19 F. Cas. 609, 611 (No. 11,134) (C.C. Mass. 1828). Further in the opinion, Story seemed to offer a restatement of the same proposition: "no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions." *Id.* at 612.

Mr. Justice Story obtained his jurisdictional concepts from continental sources, and primarily from the works of the Dutch legal theorist Huber. See Hazard, *supra* note 7, at 258 & n.59. However, continental political theory rested chiefly on intellectual constructs divorced from the very delicate and difficult problems of administration of legal rules within a federal union. Thus, it may be said that the system of concepts espoused by Justice Field in *Pennoyer* was not formulated for a federal union, but was adapted to it on the premise that these propositions were consonant with Anglo-American law in its present state. J. STORY, *supra* at § 38. Justice Story stated that Huber's doctrine "has accordingly been sanctioned both in England and America by judicial approbation, as direct and universal, as can fairly be desired for the purpose of giving sanction to it, as authority, or as reasoning." *Id.* See also Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 307 (1953).

¹³ After stating his premise that the principles of public law respecting the jurisdiction of independent sovereign nations are applicable to the several states composing our federal union, Justice Field said: "One of these principles is, that every State possesses *exclusive jurisdiction* and sovereignty over persons and property within its territory The other principle . . . follows from the one mentioned; that is,

question was physically present.¹⁴ Thus, in the context of federalism, the concept of exclusive jurisdiction served a second purpose.

For Mr. Justice Field jurisdiction based on the physical presence of property, as well as persons, was a natural corollary to the principle of exclusive territorial sovereignty among the several states. Although the conceptual differentiation between jurisdiction in rem and jurisdiction in personam was unknown to the English courts,¹⁵ the practice of adjudicating claims against absent defendants after attaching their property was a well-established phenomenon under the common law procedure of default judgments.¹⁶ Originating as one of the milder forms of duress employed to compel the defendant's appearance, the English writ of attachment directed the sheriff to seize the defendant's goods until he appeared to conduct his defense.¹⁷ Thus, as part of American common law herit-

that no State can exercise *direct* jurisdiction and authority over persons or property without its territory." 95 U.S. at 722 (emphasis added).

¹⁴ Judge Sobeloff of the United States Court of Appeals for the Fourth Circuit extra-judicially explained the function of a geographical restriction on state judicial power: "The restriction, based purely on the limited power of the individual state, irrespective of the existence of other states, helps to maintain the individuality of all the states, since all are similarly situated." Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L.Q. 196, 197 (1957).

¹⁵ There were no English sources for the distinction as made by Mr. Justice Field between jurisdiction in personam and jurisdiction in rem. Hazard, *supra* note 7, at 258. However, its origin has been found in Roman law. W. BUCKLAND & A. MCNAIR, *ROMAN LAW AND COMMON LAW* 89 (2d ed. rev. 1965); W. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 654-57 (1938). The terms "actiones in rem" and "actiones in personam" were transferred from Roman law to the English law becoming "real actions" and "personal actions," but the meaning of the terms became distorted in the translation. "[R]eal actions" came to mean nothing more than actions for the specific recovery of land, while personal actions were actions for damages." W. BURDICK, *supra* at 302. Furthermore, there could be no common law heritage for solving the problems of territorial jurisdiction among the states, since the jurisdictional relationships within the British Empire could hardly be called relationships among equal states in light of the imperial supervision running throughout. Indeed, an impressive line of cases, both English and American, might be compiled which are very much at variance with the propositions advanced by Story. See Hazard, *supra* note 7, at 260-61.

¹⁶ See Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303, 303-04 (1962). See generally R. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 74-84 (1952); Mussman & Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 7-17 (1942).

¹⁷ See Carrington, *supra* note 16. The procedure for default judgments developed in the Lord Mayor's Court of London where the defendant's property was seized and his debts garnished without notice to him, and turned over to the plaintiff subject to the right of the defendant to appear and litigate the merits within a year and a day. See Locke, *A Treatise on Foreign Attachment in the Lord Mayor's*

age, the procedure for litigating claims against absent defendants by attaching their property within the forum state was widely accepted prior to *Pennoyer*,¹⁸ the justification being that a debtor should not be allowed to evade his creditors by putting his property outside his domiciliary state.¹⁹ Without examining this reasoning, Mr. Justice Field incorporated the attachment procedure as an integral part of the *Pennoyer* system of exclusive territorial jurisdiction. Therefore, if each state had autonomous "power" over all persons and property within its borders,²⁰ it followed that each state had jurisdiction to adjudicate claims against property as well as persons present in that state.²¹ Limiting recovery in actions commenced by attachment to the value of the attached property²² was a logical necessity under the theory of *Pennoyer*, for the jurisdictional "power" of the state did not extend beyond the attached property. Thus,

Court of London, in C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES 699, 705-06, 709-10 (2d ed. 1858).

¹⁸ See *Ownbey v. Morgan*, 256 U.S. 94 (1921). See generally R. MORRIS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784 at 19-20 (1935); Mussman & Riesenfeld, *supra* note 16.

The distinction between jurisdiction in personam and in rem had been recognized in American decisions for at least a century prior to *Pennoyer*, see, e.g., *Kibbe v. Kibbe*, Kirby 119 (Conn. 1786); *Fenton v. Garlick*, 8 Johns. 150 (N.Y. Sup. Ct. 1811); *Kilburn v. Woodworth*, 5 Johns. 37 (N.Y. Sup. Ct. 1809); *Phelps v. Holker*, 1 Pa. 261 (1788); and the formulation of the differentiation remains basically unchanged today. "A judgment in personam imposes a personal liability or obligation on one person in favor of another. A judgment in rem affects the interests of all persons in designated property." *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958).

¹⁹ See 1 J. BEALE, CONFLICT OF LAWS § 106.1 (1935). "The difficulty with such a rationale is that the defendant may not be attempting to evade his creditors by owning property in another state. Unless proof of such conduct is required, the rationale actually means that evasion is presumed in order to assert jurisdiction. It seems that the additional burden of requiring the creditor to obtain a judgment against the defendant personally, and then to satisfy that judgment out of the defendant's property wherever it can be found, is comparatively slight when balanced against the possible injustice resulting from the presumption of fraud." *Developments- Jurisdiction*, *supra* note 2, at 955.

²⁰ See notes 10-12 *supra* and accompanying text.

²¹ See 95 U.S. at 723-26. The *Pennoyer* justification for the exercise of jurisdiction in rem was that "power" over the property by virtue of its presence within the state gave that state the right to adjudicate interests in the property. This was in sharp contrast with the former equitable evasion of creditors rationale. See note 18 *supra*.

²² *Id.* As the cases quoted in the *Pennoyer* opinion amply illustrate, the value limitation on in rem judgments was well established in American law prior to *Pennoyer*. See *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308 (1870); *Boswell's Lessee v. Otis*, 50 U.S. (9 How.) 336 (1850); *Picquet v. Swan*, 19 F. Cas. 609 (No. 11,134) (C.C. Mass. 1828).

the theoretical necessity was created for the mechanical distinction between jurisdiction in personam pursuant to which the court may impose upon the defendant an unlimited personal judgment and jurisdiction in rem by which only the legal interests in the attached property may be affected.²³

Having established the state's power over property belonging to an absent defendant, the *Pennoyer* Court still faced the task of reconciling the exercise of that power with the due process requirement of notice to the defendant in light of Mr. Justice Field's proposition that service of process could not run outside state boundaries.²⁴ The solution was resort to a fictional equation of "seizure" with "notice": since the law assumes that property is always in the possession of its owner, seizure or attachment of the defendant's property will automatically notify him of the proceedings.²⁵ Yet, the very fact that the Court found it necessary to incorporate this fiction seems an admission that, regardless of the characterization of an action as in rem or in personam, the court is undertaking an adjudication of the legal interests of *persons*.²⁶ Without question, an individual's personal rights are directly affected when his interest in property is terminated, and his presence or absence at the time of termination would not seem to alter that conclusion. But since a state, under *Pennoyer*, could not directly determine the rights of persons who were outside its territorial boundaries,²⁷ it became necessary to rely on the alternative in rem jurisdiction which, at least fictionally, *directly* affected only the attached property. The practical effect of the *Pennoyer* decision, therefore, was to recognize two valid bases for jurisdiction over a *defendant*: (1) physical presence of his person within the state, and (2) physical presence of his property in the state.

Although application of the *Pennoyer* principles was almost mechanical when attachment of real property or tangible personal property was involved,²⁸ intangible property posed a threat to the supposedly all-in-

²³ See note 18 *supra*.

²⁴ See 95 U.S. at 726-28.

²⁵ *Id.* at 727.

²⁶ See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-36 (1966). See also Traynor, *Is This Conflict Really Necessary?* 37 TEX. L. REV. 657 (1959).

²⁷ "[N]o State can exercise direct jurisdiction and authority over persons or property without its territory." 95 U.S. at 722.

²⁸ See A. EHRENZWEIG, *supra* note 3, at 83. Ownership of real estate within the forum represents a significant connection between the defendant and the state, since the owner has usually established the connection by his own voluntary action.

clusive system, for intangibles, by definition, cannot be said to be *present* within the territory of any particular state. As personal assets increasingly took the form of intangible obligations, the possibility arose that a debtor might be able to hold his property in a form that his creditors could not reach through the attachment procedure. Therefore, while implicitly admitting that the concept of exclusive territorial jurisdiction provided no rule for attachment of intangibles, the Supreme Court, in the threshold case of *Harris v. Balk*,²⁹ resorted to fiction to bring intangibles within the *Pennoyer* system. The central issue in *Harris* was whether Maryland had obtained in rem jurisdiction over the intangible personal property of Balk by serving Harris, a North Carolina resident who was indebted to Balk, with a writ of attachment while he was traveling through Maryland.³⁰ In classic *Pennoyer* terms, Balk argued that Maryland could have no jurisdiction over the debt, the property attached, since the obligation had been created in North Carolina between North Carolina residents³¹ and, consequently, must be located in North Carolina, subject only to that state's jurisdiction.³² Harris, on the other hand, countered that while he was physically present in Maryland, he was personally subject to Maryland's jurisdiction.³³ Each argument was conceptually feasible under the *Pennoyer* system, the factual situation seeming to fall within both purportedly mutually exclusive categories—jurisdiction over persons and jurisdiction over things.³⁴ However, instead of assessing the reason-

The same might be said with respect to tangible personal property to the extent that the owner exercises control over its location. Such property can have only one location, and jurisdiction based upon that location seems at least as fair as transitory personal jurisdiction. See F. JAMES, CIVIL PROCEDURE § 12.7 (1965).

²⁹ 198 U.S. 215 (1905).

³⁰ *Harris v. Balk* involved a refusal by a North Carolina court to give full faith and credit to a Maryland judgment rendered in a garnishment proceeding against Balk, a resident of North Carolina. In a preliminary action Epstein, a citizen of Maryland, instituted a Maryland suit against Balk upon an alleged debt by attaching the defendant's property purportedly located in Maryland. The property consisted of a sum of money concededly owed Balk by Harris, a North Carolina resident who was served with a writ of attachment while traveling through Maryland. Upon Balk's failure to appear, the Maryland court entered a default judgment and ordered Harris, the garnishee, to pay the money he owed Balk to the Maryland plaintiff. Subsequently Balk brought action in North Carolina to recover his debt from Harris who resisted on the ground that North Carolina had to give full faith and credit to the Maryland decision ordering payment to Epstein.

³¹ Both Harris and Balk were citizens of North Carolina.

³² 198 U.S. at 221.

³³ *Id.*

³⁴ See Hazard, *supra* note 7, at 278-79.

ableness of compelling a nonresident to defend the suit in Maryland, the appropriateness of Maryland as a forum to litigate the claim against Balk, or the significance of Balk's contact with that state, the *Harris* Court simply assigned a fictional presence to the debt, holding that a debt is intangible property "deemed" to be located for purposes of attachment in any jurisdiction in which the debtor might be personally served. Rationalization of this result rests on yet another fiction — that the plaintiff in a garnishment proceeding is a "representative" of the creditor of the garnishee. The *Harris* Court could not recognize the garnishment proceeding as a suit in Maryland against a North Carolina resident because it could not be consistent with the *Pennoyer* concept of exclusive territorial power over persons and things and at the same time approach the problem as one of determining the reasonableness of compelling the nonresident defendant to come to this forum to defend the action. The Court followed the *Pennoyer* power approach, reasoning that power over the person of the garnishee gives the state power over the obligations of the garnishee and thus power to litigate the defendant's rights in those obligations. Under this approach the object of the action over which the Maryland court was exercising jurisdiction was the debt which had been fictionally located in Maryland, and not the defendant. So any consideration of fairness to the defendant and appropriateness of Maryland as a forum for litigating the claim against the nonresident defendant was irrelevant, because under the *Pennoyer* system of concepts Maryland was exercising power over the debt which was fictionally within its borders, not over the absent defendant who was beyond the "power" of that state. The use of a fictional situs did bring the attachment of intangibles within the *Pennoyer* framework. However, in so doing, the *Harris* Court overlooked the functional consideration that perhaps stronger reasons exist for refusing jurisdiction in the case of incorporeal obligations, the location of which may be less subject to their owner's control than land, chattels, or the physical presence of the person himself.

Apparently, the principal factor prompting the *Harris* ruling that a debt is "deemed" to be present in any state where the debtor might be personally sued was the forum state's ability to *enforce* the remedy it might grant. Once a tribunal obtained personal jurisdiction over the debtor of the defendant, it was no doubt felt that judicial economy would be well served if the court which might enter judgment against the absent defendant could also secure satisfaction of that judgment by compelling

the debtor of the defendant to make payment to the plaintiff.³⁵ However, application of the full faith and credit clause would seem to reduce the importance of the enforceability factor³⁶ in the determination of the jurisdictional issue. Such a consideration would not seem to justify the consequent increased risk of unfairness caused by *Harris'* multiplication of a defendant's vulnerability to transitory jurisdiction.³⁷ Thus, under the *Harris* rule, a defendant may be subjected to suit not only where his real and personal property is located or where he himself might be personally served, but also in all states where his debtors happen to venture.

EROSION OF PENNOYER

The practical demands of an increasingly mobile society have precipitated erosion of the concept of exclusive territorial sovereignty as applied to personal jurisdiction.³⁸ Predictably, an early medium of this determination was the fiction of implied "consent." Under *Pennoyer's* strict territorial limitation on service of process, jurisdiction could not be ob-

³⁵ Enforcement of foreign judgments was often difficult during the infant years of the full faith and credit clause. Thus, the litigational convenience of proceeding in the state where the assets were located, thereby eliminating the necessity of additional suits, promoted the practice of commencing suits by attaching the defendant's property. See von Mehren & Trautman, *supra* note 26, at 1178. Besides these administrative considerations of economy of judicial effort, the presence of a defendant's property within a state often indicated other contacts with the state which justified litigation in that forum.

³⁶ But see note 14 *supra* and accompanying text.

³⁷ "A state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." RESTATEMENT (SECOND), CONFLICT OF LAWS § 28 (Proposed Official Draft, Pt. I, 1967). Such a rule compelling travelers "to run the gauntlet of such litigation under threat of snap judgment" offers "premiums to scavengers of sham and stale claims at every center of travel." Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 143, 34 A. 714, 729 (1895) (dissenting opinion, Hammersley, J.). The rule may result in litigation in a forum which has no relationship whatsoever to the controversy or the defendant other than the fact that he was served with process while passing through the state's territory. RESTATEMENT (SECOND), CONFLICT OF LAWS § 28 comment *a* at 153 (Proposed Official Draft, Pt. I, 1967). The extreme which the transitory rule has reached is illustrated by *Grace v. MacArthur* where the defendant was served with process while in an airplane flying over the state. 170 F. Supp. 442 (E.D. Ark. 1959). For a full discussion and criticism of the transient rule of jurisdiction see generally Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Ross, *The Shifting Basis of Jurisdiction*, 17 MINN. L. REV. 146 (1932).

³⁸ See Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 575-86 (1958); *Developments—Jurisdiction*, *supra* note 2, at 919-23.

tained over the nonresident motorist who committed a tort within a state, then departed before he could be served. However, in 1927 the Supreme Court upheld a state statute which provided that a nonresident motorist who used a state's highways impliedly consented to be sued in its courts for any cause of action arising out of the use of the highways.³⁹ Similarly, nonresident individuals conducting business in the forum state through agents were immune to the jurisdiction of that state's courts under strict *Pennoyer* reasoning. Yet, in 1935 the Court held that a nonresident securities dealer, by engaging in an activity subject to special regulation by the state, impliedly consented to the assertion of state jurisdiction over him in causes of action arising out of transactions within the state.⁴⁰ The implied consent rationale was applied to corporations as well as individuals.⁴¹ Furthermore, jurisdiction over foreign corporations was sustained on the theory that the entity was constructively "present" in the forum state if it was doing business there.⁴² As a consequence of these constructs, state-court jurisdiction was extended to reach defendants far beyond the boundaries of the forum state, in direct contradiction to the basic premise of the *Pennoyer* system.⁴³ However, by shrouding this result with fictions, the Court was able to remain faithful, at least superficially, to *Pennoyer*.

In *International Shoe Company v. Washington*,⁴⁴ however, the point was finally reached where the self-serving assumptions necessary to maintain the conceptual system became so complex that abandonment was more attractive than judicial manipulation. In that case the issue was whether the State of Washington had the power to impose taxes upon the International Shoe Company, a foreign corporation maintaining agents in that state. Discarding the constructive presence and implied consent rationales, the Supreme Court ruled that in personal jurisdiction cases, due process would be achieved if the defendant had certain "minimum contacts" with the forum state "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁴⁵ Since the corporate personality itself is a fiction, the Court accurately noted that to frame the due process inquiry in terms of whether the corporate defendant is

³⁹ *Hess v. Pawloski*, 274 U.S. 352 (1927).

⁴⁰ *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

⁴¹ *Developments—Jurisdiction*, *supra* note 2, at 919-23.

⁴² *Id.* at 921-23.

⁴³ See notes 13 *supra* & 52 *infra* and accompanying text.

⁴⁴ 326 U.S. 310 (1945).

⁴⁵ *Id.* at 316.

"present" within the forum state is to beg the question, for the term "presence" is used merely to symbolize those activities of the defendant corporation within the state which are sufficient to satisfy the demands of due process.⁴⁶ Instead, the Court directly assessed those activities against the fairness standard of the due process clause and found them sufficient.

In contrast to the *Pennoyer* system, the due process test of personal jurisdiction espoused in *International Shoe* is neither mechanical nor quantitative, but rather depends upon the quality and nature of the activity of the defendant which establishes his contacts with the forum state.⁴⁷ More basically, the concept of jurisdiction based upon de facto power over the defendant's person was replaced by the principle that the defendant's contacts with the forum state determined the reasonableness of requiring him to appear in that state to defend a particular suit.⁴⁸ Furthermore, under the *Pennoyer* system, the state possessed exclusive jurisdiction over persons actually or fictionally "present" within the borders of that state, regardless of the subject matter of the litigation.⁴⁹ Prominent in the *International Shoe* opinion, however, is the precept that the activity of the defendant which established his contacts with the state must also be the activity that gave rise to the immediate cause of action.⁵⁰ The Court reasoned that only to the extent that a person enjoyed the benefits and protection of a state's laws by conducting activities within that state was it reasonable and just for that state to assert jurisdiction over him.⁵¹ In-

⁴⁶ *Id.* at 316-17, citing *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930) (L. Hand, J.). After discussing the fictional nature of the corporate "presence" concept, the court directed its attention to the legal fiction of implied consent: "[S]ome of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction." 326 U.S. at 318.

⁴⁷ 326 U.S. at 319.

⁴⁸ Mr. Justice Holmes succinctly stated the rule: "The foundation of jurisdiction is physical power" *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). *Cf. Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913).

⁴⁹ RESTATEMENT (SECOND), CONFLICT OF LAWS § 28, comment *b* at 153 (Proposed Official Draft, Pt. I, 1967): "Physical presence in the state gives the state a basis for the exercise of personal jurisdiction over the individual in any action that may be there brought against him." See note 37 *supra*.

⁵⁰ See 326 U.S. at 317, 320, 321.

⁵¹ *Id.* at 319-21. Twelve years later in *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court insisted that to satisfy due process the activities which establish the required minimum contacts with the forum state must be initiated by the defend-

deed, by so restricting state jurisdiction, the Court ensured the existence of substantial connection between the forum state and the subject matter of the litigation.

Although the basis for the exercise of in personam jurisdiction has been the subject of major reevaluation, courts and legislatures alike have contently preserved *Pennoyer's* mechanical rules for in rem jurisdiction. Nevertheless, *International Shoe* did signal the dissolution of *Pennoyer's* territorialist theory that a defendant must be personally "present" within a state before the state may directly modify his legal interests. Since a state having "minimum contacts" with the defendant could now serve process upon and adjudicate claims against him regardless of his actual presence, the theoretical necessity for the in rem-in personam dichotomy was undermined. Once that obstacle was removed, it seemed reasonable that some modification of in rem concepts could be undertaken, for regardless of the label attached, every judicial action involves the adjudication of personal rights. Therefore, the same notions of fundamental fairness to the defendant espoused in *International Shoe* would seem to apply equally to jurisdiction in rem as well as in personam.

Furthermore, the demise of the exclusive territorialist concept was accompanied by a reinterpretation of the due process clause's notice requirements. As the state's power to serve process was extended beyond state boundaries,⁵² the fictional equation of seizure with notice in an in

ant. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. This statement is based on the premise that a defendant should be able to control his exposure to litigation in foreign forums and be subject to jurisdiction only in states where he should anticipate that suit might be properly maintained.

Hanson v. Denckla involved a state court claim of jurisdiction in rem as well as in personam jurisdiction. The above discussion involves only that portion of the Court's opinion dealing with the assertion of jurisdiction in personam. For discussion of the *Hanson* opinion in its entirety, see notes 70-78 *infra* and accompanying text.

⁵²The initial extensions of service beyond territorial boundaries of the state were accomplished through "constructive service" within the state by publication or upon agents. *E.g.*, *Hess v. Pawloski*, 274 U.S. 352 (1927) (constructive service on nonresident motorist involved in domestic accident); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935) (constructive service on nonresident securities dealer engaged in business in the forum state). A further step was taken in 1940 when the Supreme Court held that personal service outside the state upon an absent

rem context⁵³ was no longer necessary, since a nonresident defendant whose property is attached may be served personally at his domicile even if it is outside the forum state.⁵⁴ Indeed it was no longer constitutional to equate attachment with notice. *Mullane v. Central Hanover Bank and Trust Company*⁵⁵ held that due process requires notice reasonably calculated to inform the defendant of the action against him, a standard not always met by seizure. In *Mullane* it was argued that the proceedings were in rem and the defendants were accordingly bound regardless of

domiciliary satisfied the requirements of due process. *Milliken v. Meyer*, 311 U.S. 457 (1940). The rather illusory concept of "implied consent" by which the Court attempted to reconcile these extensions with the *Pennoyer* territorialist theory was somewhat belatedly abandoned in 1953. *Olberding v. Illinois Central R.R.*, 346 U.S. 338 (1953). In that case Justice Frankfurter referring to the Court's earlier decision in *Hess v. Pawloski* said: "But to conclude from this holding that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued . . . is surely to move in the world of Alice in Wonderland." *Id.* at 341. Frankfurter instead chose to base his affirmation of statutory service of process on nonresident motorists on the legitimate interest of the state in providing a forum to its residents in which to litigate actions arising out of accidents occurring within the state.

Service of process on foreign corporations experienced a similar history. Substituted service upon an agent of the corporation within the forum state was sufficient if the corporation could be said to be "present" in the state. In 1945 the Supreme Court exposed the fiction of corporate "presence" and restated the determination of amenability to service in terms of "minimum contacts." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See note 46 *supra* and accompanying text.

Encouraged by these decisions of the Supreme Court, several states have issued the death blow to the *Pennoyer* territorial limitation on service of process by enacting "long arm" statutes providing for extraterritorial service of process on absentees in causes of action arising out of certain activities within the state. *E.g.*, ILL. REV. STAT. ch. 110, § 17 (1965); see Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533. See generally Ehrenzweig, *supra* note 37, at 309-14; Ehrenzweig & Mills, *Personal Service Outside the State*, 41 CALIF. L. REV. 383 (1953); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 272-75.

⁵³ See notes 24-26 *supra* and accompanying text. *Pennoyer* established the rule that due process required no effort to give notice other than seizure or its jurisdictional equivalent. See, *e.g.*, *Security Savings Bank v. California*, 263 U.S. 282 (1923); *Ballard v. Hunter*, 204 U.S. 241 (1907); *Arndt v. Griggs*, 134 U.S. 316 (1890); *Huling v. Kaw Valley Ry. & Improvement Co.*, 130 U.S. 559 (1889). Any other provision for notice would have required extraterritorial service of process, in contradiction to *Pennoyer*'s territorialist theory.

⁵⁴ However, local statutes can limit the jurisdiction available to the state courts under the liberalized interpretation of the due process clause. See, *e.g.*, *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958). See also Traynor, *supra* note 26, at 662-63.

⁵⁵ 339 U.S. 306 (1950).

notice. Rejecting this contention by finding that the notice by attachment and publication was insufficient, the Court answered that "the requirements of the Fourteenth Amendment . . . do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state."⁵⁶ Such a statement seemed the first step in eroding the in rem concepts of *Pennoyer*.

Further recognition that the *International Shoe* minimum contacts test does transcend the traditional in rem-in personam categorization can be found in the so-called "long-arm statutes" enacted in the aftermath of that decision.⁵⁷ The statutes typically subject a person to the jurisdiction of the courts as to any cause of action arising from his ownership, use, or possession of any real estate situated in the enacting state.⁵⁸ Under the *Pennoyer* system of concepts, jurisdiction based on the location of real property within the state would invoke the mechanical classification of the action as in rem. Yet, states with long-arm statutes have determined that ownership of realty satisfies the minimum-contacts test and subjects the owner to *personal* jurisdiction. The repudiation of the *Pennoyer* territorialist requirement that a defendant be personally "present" within a state before a state may directly affect his legal interests also eliminated the theoretical necessity of viewing the legal interests in property attached in quasi in rem actions as somehow divorced from the non-resident defendant-owners. With these erosions of in rem concepts before them, courts should have little hesitancy both to recognize jurisdiction quasi in rem for what it is—a basis of jurisdiction to adjudicate the legal rights of absent defendants—and to critically analyze it as such in light of the minimum-contacts approach to due process.

Should an interest-analysis approach be applied to traditional quasi in rem cases, the disparity between the contacts required by the *Pennoyer* system, as compared to those essential to *International Shoe* jurisdiction,

⁵⁶ *Id.* at 312.

⁵⁷ Long arm statutes are based on the principle that one should be amenable to suit in a state on any cause of action arising out of certain specified activities within that state determined by their legislatures to be significant. See, e.g., IDAHO CODE ANN. § 5-514 (Supp. 1967); ILL. REV. STAT. ch. 110, § 17 (1963); ME. REV. STAT. ANN. tit. 14, § 704 (1965); MONT. REV. CODES ANN. § 93-2701-4B (Supp. 1967); N.M. STAT. ANN. § 21-3-16 (Supp. 1967); N.Y. CIV. PRAC. LAW § 302 (McKinney Supp 1967); WASH. REV. CODE § 4.28.185 (1962); WIS. STAT. ANN. § 262.05 (Supp. 1968). See generally Currie, *supra* note 60; note 52 *supra*.

⁵⁸ See, e.g., ILL. REV. STAT. ch. 110, § 17(1)(c) (1963).

would be evident. Thus, the historical exercise of jurisdiction quasi in rem whenever property of the nonresident defendant can be found and attached within the forum state would not always be found to satisfy the *International Shoe* demand that the contact upon which state jurisdiction rests also be the source of the cause of action,⁵⁹ nor the requirement established in *Hanson v. Denckla*⁶⁰ that the contact be an affirmative and purposeful act by the defendant to avail himself of the privileges and protections of that state. Quasi in rem jurisdiction under the *Pennoyer* approach requires no correlation between the defendant's contact with the state—the property attached—and the cause of action against the absent defendant. Consequently, there is no assurance that judicial assignment of a fictional “presence” to intangible obligations reflects a determination that there exist sufficient contacts with the forum state to satisfy the requirements of due process.⁶¹ The *Hanson* requirement might be met in the case of attachment of tangible property which is under the defendant's control and is present in the forum state with the knowledge of the defendant. But it is most difficult to assert that a defendant avails himself of the privileges and benefits of conducting activities within a state when his intangible obligations are found to be “present” within a state through which his debtor happens to be traveling.⁶² In short, jurisdiction based on the attachment of intangibles simply does not satisfy the requirements of the minimum-contacts test announced in *International Shoe*.

Pennoyer-styled quasi in rem jurisdiction over tangible or intangible property is not immunized from the full rigors of due process simply because the amount of recovery in such actions is limited to the value of the attached property.⁶³ This monetary restriction is merely a vestige

⁵⁹ See notes 50-51 *supra* and accompanying text.

⁶⁰ 357 U.S. 235 (1958). See note 51 *supra*.

⁶¹ While *Pennoyer* concepts provide no check on the assignment of fictional “presence” to intangibles, Mr. Justice Cardozo urged that as a goal as early as 1931: “The situs of intangibles is in truth a legal fiction The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions.” *Severnoe Securities Corp. v. London & Lancashire Ins. Co.*, 255 N.Y. 120, 123, 174 N.E. 299, 300 (1931).

⁶² If there is any justification for an exercise of jurisdiction over a transient debtor, it would seem to be that the defendant has assumed this risk through creation of the debtor-creditor relationship. But this analysis begs essential questions. See note 37 *supra* and accompanying text.

⁶³ See note 22 *supra* and accompanying text.

of the *Pennoyer* concept that the jurisdictional "power" of a state was limited to persons and things physically present within its borders. With the demise of physical "presence" as an essential jurisdictional requisite, the necessity of limiting judgments against nonresidents to the value of their property located within the forum state is also dissipated. Likewise, courts are free—perhaps compelled—to recognize that litigation of a controversy in an inappropriate forum is no less unfair to the defendant when a limit is placed on any possible judgment than when a decision may be rendered for the full amount of the claim.

The California Supreme Court in *Atkinson v. Superior Court*⁶⁴ attempted to remedy the legal discrepancy of applying an interest analysis approach to personal jurisdiction while retaining the fictional *res* as the controlling factor in questions of jurisdiction quasi in *rem*. *Atkinson* involved a California suit by members of the American Federation of Musicians attacking the validity of a collective bargaining agreement which provided that the employers of musicians were to pay certain funds to a New York trustee. The musicians claimed that the funds actually constituted salary, and, thus, the employers' obligation to make the payments was one owing to the musicians and not to the New York trustee, as called for in the agreement. Personal jurisdiction could not be obtained over the New York trustee because a California statute precluded personal judgments against nonresidents served extraterritorially or by publication, so the musicians sought to establish jurisdiction in *rem* by attaching the obligation of the employers to make the payment involved.

The California court forthrightly rejected the traditional approach to jurisdiction quasi in *rem*, stating that "the solution [to the jurisdictional problem] must be sought in the general principles governing jurisdiction over persons and property rather than in an attempt to assign a fictional situs to intangibles."⁶⁵ The relevant considerations were identified as the contacts of the parties and the action to the forum state, not the fictional location of the defendant's debt. Significantly, the majority, through Chief Justice Traynor, declined the opportunity to distinguish between the situations, such as *Harris v. Balk*, involving jurisdiction to take over a nonresident's claim to a debt *concededly* owed to him by a third party, and those, such as *Atkinson*, in which jurisdiction is assumed in order to establish that the alleged debt was owed to the plaintiff and

⁶⁴ 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958).

⁶⁵ *Id.* at 345, 316 P.2d at 964.

was *never* the property of the nonresident.⁶⁶ He viewed the crucial issue as being identical in both situations: Since the nonresident can protect his interest in the property only by submitting to the jurisdiction of the court, is it fair to require him to appear?⁶⁷ Answering the inquiry, the *Atkinson* majority concluded that the defendant had enough contacts with California to justify full in personam jurisdiction under *International Shoe*.⁶⁸ However, the California court was compelled by a state statute precluding personal judgments against nonresident defendants to resort to the old labeling and to construct a quasi in rem basis for jurisdiction. In so doing, the *Atkinson* opinion made clear that when statutes such as the one in California persist in preserving the mechanical distinctions between jurisdiction in rem and in personam, realistic tests based on fairness to the defendant should be applied to determine in rem jurisdiction to litigate the particular controversy.⁶⁹

While a certiorari petition from the *Atkinson* decision was pending, the United State Supreme Court in *Hanson v. Denckla*⁷⁰ made an abortive effort to apply both *Pennoyer* and *International Shoe* within the same decision. The controversy involved part of the corpus of a trust established in Delaware under the administration of a Delaware trust company

⁶⁶ *Id.* at 346, 316 P.2d at 965. Although the opinion did not mention *Harris v. Balk* specifically, it is notable that Chief Justice Traynor chose not to rely upon the distinction between the fact situation in *Atkinson* and that in *Harris* to avoid conflict with Supreme Court precedent, but rather chose to render a decision of general applicability to all actions quasi in rem, despite that precedent.

⁶⁷ *Id.*

⁶⁸ See Traynor, *Is This Conflict Really Necessary?* 37 TEX. L. REV. 657, 662-63 (1959). In his discussion of *Atkinson*, Justice Traynor noted that "[a]ll of the parties had substantial contacts with California, the forum state. Plaintiffs were residents of California. The payments in question allegedly represented their wages for work in California. The major elements of the transaction were in California; the trustee had brought himself into this essentially local transaction by accepting the trust; and under conventional choice of law rules, California law would govern the question whether plaintiffs' compensation could be diverted to the trustee." *Id.*

⁶⁹ The fact that the California court in *Atkinson* was compelled by state statute to resort to in rem jurisdiction illustrates the limitation which *Pennoyer*-inspired state statutes have placed on the latitude now afforded state courts by *International Shoe* to exercise personal jurisdiction over nonresidents. See *id.* at 662. Logically, however, the newly expanded personal jurisdiction espoused in *International Shoe* and more recently embodied in long-arm statutes will displace any legitimate need to resort to jurisdiction quasi in rem. If the state where the defendant's property is located is an appropriate forum to litigate a particular controversy—as it must be to satisfy due process—the plaintiff will be able to obtain personal jurisdiction over the defendant and will have neither a need nor a desire to resort to jurisdiction quasi in rem.

⁷⁰ 357 U.S. 235 (1958). See notes 51, 60-62 *supra* and accompanying text.

by a settlor who subsequently moved to Florida and there purported to exercise a power of appointment under the terms of the trust. After the death of the settlor in Florida, legatees secured a Florida judgment declaring invalid the exercise of the power of appointment. The Supreme Court held that the Florida court had neither in rem jurisdiction over the trust corpus nor personal jurisdiction over the Delaware trustee, and thus the judgment of that court was not entitled to full faith and credit in the Delaware courts where the legatees sought to enforce it.

In holding that there were not sufficient contacts, activities, or "affiliating circumstances"⁷¹ between the Delaware trustee and the state of Florida to justify subjecting the trustee to personal jurisdiction,⁷² the *Hanson* Court remained consistent with the *International Shoe* interest analysis approach. Indeed, *Hanson's* imposition of the requirement that the defendant purposefully avail himself of the privileges of conducting activity within the forum state⁷³ is a refinement upon the principles of *International Shoe*.⁷⁴ However, the Court's analysis of Florida's assertion of in rem jurisdiction was cluttered with *Pennoyer* rhetoric: "The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State."⁷⁵ Assuming *arguendo* that the *Hanson* majority was correct in rejecting the view that the trustee was simply a stakeholder or agent of the settlor,⁷⁶ the result in the case might very well have been the same even if the Court had used an interest-analysis approach to reach its decision.⁷⁷ However, it is not the result but rather

⁷¹ The term "affiliating circumstances" was used by Chief Justice Warren to denote those circumstances "without which the courts of a State may not enter a judgment imposing obligations on persons . . . or affecting interests in property" 357 U.S. at 246.

⁷² See 357 U.S. at 251-54.

⁷³ See notes 60-62 *supra* and accompanying text.

⁷⁴ The general theory of *International Shoe* is that certain activities of a non-resident defendant in a state can establish the requisite contacts to subject the defendant to the jurisdiction of the courts of that state. See notes 50-51 *supra* and accompanying text.

⁷⁵ 357 U.S. at 246.

⁷⁶ *Id.* at 263 (Douglas, J., dissenting).

⁷⁷ The trust fund which was the subject of dispute was established in Delaware by a settlor from Pennsylvania. The only contact established between the defendant Delaware trustee, who was obligee under the trust instrument and record owner of the stock which comprised the corpus in question, and the state of Florida was the transmission of correspondence and income payments to the settlor who had moved to that state sometime after the trust instrument had been executed. Argument was made to the Court that this extended correspondence constituted a sufficient contact with the forum state, in light of the Court's decision the year before in *McGee v.*

the phraseology, the mechanical analysis, and the timing⁷⁸ of the decision that proved troublesome. The Supreme Court was simply not prepared to abandon the time-honored habits of mind embodied in *Pennoyer* and the dichotomy of jurisdiction in rem and in personam. Such reluctance to undertake a reevaluation of the bases of an in rem jurisdiction has permitted courts to stretch the "power" concept even further, producing greater risks of unfairness to defendants. Such was the result of the decision of the New York Court of Appeals in *Seider v. Roth*.⁷⁹

SEIDER V. ROTH: THE INSTANT CASE

Plaintiffs in *Seider v. Roth*, residents of New York injured in Vermont in an automobile collision with a Quebec resident, instituted a New York action against the Canadian defendant by attaching the contractual obligation of the defendant's liability insurer under a policy issued in Canada. The insurer, a Connecticut corporation doing business in New York, was served with attachment papers at its New York office. The New York Court of Appeals, in a 4-3 decision, held that the insurance policy obligations constituted an attachable "debt" under New York Civil Practice Law and Rules (CPLR) sections 5201 and 6202, which authorized garnishment of a debt which is "past due or which is yet to become due, certainly or upon demand of the [creditor]"⁸⁰ By attaching the policy obligation, a New York court, without more, could obtain in rem jurisdiction over the policy's nonresident owner.

International Life Ins. Co., 355 U.S. 220 (1957). In that case an insurance company was held subject to jurisdiction in the state of the residence of the purchaser of the life insurance policy when the company's only contact with the state was correspondence with a resident of the state. However, the Court distinguished *McGee*, stating that the *McGee* correspondence took the form of solicitation by the insurance company of the very contract out of which arose the cause of action; whereas *Hanson* involved "the validity of an agreement that was entered without any connection with the forum State." 357 U.S. at 252. The cause of action did not arise out of an act done or transaction consummated in the forum State.

A legitimate criticism of the result may be launched from the Court's primary assumption in reaching the jurisdictional problem that the dispute was about the trust corpus rather than the decedent's estate. "The question was whether certain stock should be assigned to the trust corpus or to the decedent's estate; to assume it was a trust case was to assume the question in issue." Hazard, *supra* note 52, at 244.

⁷⁸ The decision in *Hanson* was rendered while petition for certiorari from the California Supreme Court's holding in *Atkinson v. Superior Court* was pending.

⁷⁹ 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). See note 5 *supra*.

⁸⁰ N.Y. CIV. PRAC. LAW § 5201(a) (McKinney 1963).

The *Seider* majority's chief premise rested on the terms of the insurance policy, which required the insurer to defend the insured in any automobile negligence action and to indemnify the insured should a judgment be rendered against him. Although the policy seemed clearly to require an action to be brought and a judgment to be rendered before the obligations became fixed and therefore attachable,⁸¹ the court ruled that "*as soon as the accident occurred* there was imposed on [the insurer] . . . a contractual obligation which should be considered a 'debt' within the meaning of [the attachment statutes] . . ."⁸² and which was therefore attachable for the purpose of obtaining in rem jurisdiction. While the court provided no alternative analysis in support of its conclusion, its reasoning seemed to be that the insurer's obligations accrue upon the occurrence of the accident, but will be divested if suit is not brought or if judgment is not rendered against the insured.⁸³

⁸¹ By the terms of the policy the insurer agreed: "3. To defend in the name and on behalf of any person insured by this policy and at the cost of the Insurer any civil action which may at any time be brought against such person on account of such loss or damage to person or property; and 4. To pay all costs, taxed against any person insured by this policy in any civil action defended by the Insurer and any interest accruing as from the date of the action upon that part of the judgment which is within the limits of the Insurer's liability . . ." Brief for Defendant-Appellant at 10-11, *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

⁸² 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101 (emphasis added).

⁸³ There is New York precedent supportive of the view that the insurer's obligation vests upon the happening of the accident. See *Fishman v. Sanders*, 18 App. Div. 2d 689, 235 N.Y.S.2d 861 (1962) (mem.), *rev'd on other grounds*, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965). The *Fishman* decision held that a liability insurer's contractual obligation to defend and indemnify the insured is a debt or cause of action capable of being attached under New York statutes. While concurring in the result, Judge Beldock in a separate opinion stated that "only the insurer's obligation to defend is attachable because only that obligation arose absolutely on the happening of the accident. The obligation to indemnify is not attachable because indemnification is contingent upon an ultimate adjudication of the defendant's liability to the plaintiffs." *Id.* at 690, 235 N.Y.S.2d at 863. *But cf.* *Lee v. Aetna Cas. & Surety Co.*, 178 F.2d 750 (2d Cir. 1949) (applying New York law); *Goldberg v. Lumber Mut. Cas. Ins. Co.*, 297 N.Y. 148, 77 N.E.2d 131 (1948).

In *Stouborough v. Preferred Accident Ins. Co.*, 292 N.Y. 154, 54 N.E.2d 342 (1944), the plaintiff, after an automobile accident but before commencement of suit, married the insured defendant. The insurer resisted payment of the judgment against the insured on the ground that the policy by express terms did not cover liability for injuries sustained by the insured's spouse. Therefore, the key inquiry became whether the plaintiff was the insured's spouse when the duty to indemnify became fixed. The court held that the insurer's duty to indemnify vested when the accident occurred, at which time the plaintiff and the insured were not married, and, therefore, indemnification was required under the terms of the policy. How-

Instead of furnishing analytical support for its decision to allow attachment of the liability policy, the *Seider* court concluded that the question had been previously decided in *Estate of Riggle*.⁸⁴ That case involved an action instituted in New York by a New York resident injured in a Wyoming accident through the alleged negligence of an Illinois decedent, to have appointed an administrator of the decedent's New York property. The only property in New York alleged to belong to the defendant was his liability policy issued by an insurer doing business in that state. The *Riggle* court held that "the personal obligation of an indemnity insurance carrier [doing business in the state] to defend [the decedent]"⁸⁵ constituted "a debt owing to a decedent by a resident of the state"⁸⁶ under section 47 of the Surrogates' Court Act. In relying upon *Riggle*, the *Seider* court necessarily proceeded on the precarious proposition that property which will support the appointment of an administrator is also attachable for jurisdictional purposes.⁸⁷ While the New York attachment statute, CPLR section 5201, refers to an attachable debt as one that is either past due or certain to become due, the Surrogate Court Act can be read to include any debt — fixed or contingent. That the two statutes contain different requirements may be illustrated by an examination of two cases cited by the *Seider* majority. *Furst v. Brady*⁸⁸ and *Robinson v. Carroll*⁸⁹ viewed the insurer's promise to indemnify as "property" within the statute governing the appointment of administrators, reasoning that *although not yet due nor to become due until its conditions were fulfilled*, the promise was no less a contractual obligation and had a present value.⁹⁰ While contingent obligations may be property in the sense of having some present

ever, it is significant that this interpretation was not made in the context of New York's attachment statutes or when a question of jurisdiction was involved—two settings which should have impelled the court to consider different factors and perhaps to reach a different result.

⁸⁴ 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

⁸⁵ *Id.* at 76, 181 N.E.2d at 437, 226 N.Y.S.2d at 417.

⁸⁶ N.Y. Surr. Ct. Proc. Law § 47 (McKinney 1965), as amended, N.Y. Surr. Ct. Proc. Law § 208 (McKinney 1967).

⁸⁷ See generally Seigel, *Practice Commentary*, N.Y. Surr. Ct. Proc. Law § 208 (McKinney Supp. 1967).

⁸⁸ 375 Ill. 425, 31 N.E.2d 606 (1940).

⁸⁹ 87 N.H. 114, 174 A. 772 (1934).

⁹⁰ A Florida decision, *In re Estate of Klipple*, 101 So. 2d 924 (Fla. App. 1958), not cited in *Seider* but certainly in accord with the reasoning of *Furst v. Brady* and *Robinson v. Carroll*, viewed the insurer's obligation as property for the purpose of appointing an administrator even though both parties to the litigation conceded that the policy was a contingent debt.

value, they are not attachable under the specific language of CPLR section 5201⁹¹ for the very reason that they are *not certain* to become obligations.⁹² Seemingly, therefore, *Riggle* does not support the majority's theory of attachment.

Riggle is distinguishable from the *Seider* situation in a second, equally important, respect: in *Riggle*, the suit had been commenced by personal service on the decedent in New York prior to his death.⁹³ Therefore, the contingency under the *Riggle* policy had already occurred, and the obligation to defend had become fixed while that contingency had not been realized prior to attachment in *Seider*.⁹⁴ In addition to the weakness of precedents used to support the *Seider* holding, a number of other important considerations point up the vulnerability of the decision. First, the language of the policy, as noted by the dissent, required the insurer to defend any automobile negligence *action brought* against the insured, and to indemnify him for any *judgment rendered* in such suit.⁹⁵ That wording clearly made the institution of suit a condition precedent to the existence of a duty to defend, and an award of damages against the insured

⁹¹ "A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor" N.Y. CIV. PRAC. LAW § 5201(a) (McKinney 1963).

"Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment" *Id.* at § 6202.

⁹² It might be argued that *Riggle* differs from *Furst* and *Robinson* in that the latter two cases concerned the "right to indemnity" which would become vested only after judgment was rendered against the insured, while the *Riggle* court discussed only the "duty to defend." But that obligation is equally contingent, the condition precedent being the commencement of an action against the insured.

⁹³ 11 N.Y.2d at 75, 181 N.E.2d at 437, 226 N.Y.S.2d at 417.

⁹⁴ Another argument advanced by the defendant in *Seider* was based on the language of the attachment statute, which states that an attachable debt "may consist of a cause of action which could be assigned or transferred" N.Y. CIV. PRAC. LAW § 5201(a) (McKinney 1963). The defendant argued that an automobile liability insurance policy is not assignable since, like other contracts of indemnity, such a policy is considered to be a personal contract; therefore, being non-assignable the policy is also not attachable. Brief for Defendant-Appellant at 8. However, the argument assumes its conclusion, for the plaintiff cited New York authority for the proposition that after the event has occurred by which liability under a policy is fastened upon the insurer, the rights under the policy may be assigned, since it is not the personal contract, but rather a right of action on the policy which is being assigned. Brief for Plaintiffs-Respondents at 10. So the basic question remains, when does the insurer's obligation become fixed? Even assuming that the policy obligations are not assignable, "[t]he fact that a debt *may* consist of a cause of action which can be assigned or transferred does not mandate that it *must* consist of a cause of action which can be assigned or transferred." *Id.* at 9.

⁹⁵ See note 81 *supra*.

a prerequisite to any obligation to indemnify. Therefore, the dissent, interpreting the statutory language, concluded that such a contractual obligation which was still contingent could not be attached.⁹⁶ Secondly, the *Seider* court attached not the concededly vested present value of these contingent obligations,⁹⁷ but rather the obligations themselves which the court construed to have fully matured as soon as the accident occurred.⁹⁸ In that form, the obligations, even if defeasible, remained conditional and, therefore, could not satisfy the certainty requirement of the attachment statute. The only event which could remove the element of uncertainty from the obligation—and then only as to that part of the obligation which involved the duty to defend—was commencement of an action against the insured. The circularity of the court's reasoning becomes evident: Jurisdiction to maintain the action in New York can only be based on the attachment of a fixed contractual obligation, yet such an obligation, by the terms of the contract itself, cannot be fixed until an action is commenced.⁹⁹

⁹⁶ 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (dissenting opinion). Judge Burke argued for the dissent that "[t]he so-called 'debt' which is supposed to be subject to attachment is a mere promise made to the nonresident insured by the foreign insurance carrier to *defend and indemnify* the Canadian resident *if a suit is commenced and if damages are awarded against the insured*. Such a promise is contingent in nature. It is exactly this type of contingent undertaking which does not fall within the definition of attachable debt contained in CIV. PRAC. LAW § 5201 (subd. [a]), i.e., one which 'is past due or which is yet to become due, certainly or upon demand of the judgment debtor.' The bare undertaking to defend and indemnify is not an obligation 'past due' and it is not certain to become due until jurisdiction over the insured is *properly* obtained." *Id.*

The majority at least implicitly conceded the conditional nature of the insurer's obligations to defend and indemnify when it purported to distinguish them from the additional "obligations" of the insured to negotiate with the claimant and reach a settlement by noting that the latter "obligations" accrue regardless of whether or not the suit is ever brought. Thus, after noting that the insurer was required to defend the insured in any action commenced against him and to indemnify the insured if judgment be rendered against him, the court stated that "the policy casts on the insurer several obligations which accrue as soon as the insurer gets notice of an accident, and whether or not a suit is ever brought." *Id.* at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101. The court then proceeded to a discussion of one of these so-called "obligations," the insurer's option to investigate the accident when notice is received "and if expedient to negotiate or settle with the claimant." *Id.* See note 102 *infra*.

⁹⁷ In this respect a contingent obligation is similar to a contingent interest in real property which may be bought and sold. See, e.g., L. SIMES, *FUTURE INTERESTS* § 33 (2d ed. 1966). See notes 88-92 *supra* and accompanying text.

⁹⁸ See note 82 *supra* and accompanying text.

⁹⁹ See 17 N.Y.2d at 115, 216 N.E.2d at 315, 269 N.Y.S.2d at 103 (Burke, J., dissenting): "[t]he jurisdiction, they [the plaintiffs] assert, is based upon a promise which evidently does not mature until there is jurisdiction. The existence of the

The confusion surrounding *Seider* is not confined to commencement of the action. The traditional attached property-value limitation on in rem judgments¹⁰⁰ poses the additional problem under the *Seider* procedure of determining the actual worth of the "property" attached. The insurer's "obligations," so-called by the court,¹⁰¹ to investigate, negotiate, and settle were not obligations owing to the insured under the terms of the policy but *options* available to the insurer,¹⁰² having no present or future value to the defendant-insured. As for the worth of the duty to defend, prior decisions had refused to evaluate non-monetary debts, holding simply that obligations payable in services rather than in money cannot be attached.¹⁰³ Yet, the New York Court of Appeals in *Simpson v. Loehmann*,¹⁰⁴ a decision reaffirming that court's jurisdictional stand in *Seider*, seemed oblivious to the complexities involved in valuing the components of the bundle of attached obligations and disposed of the problem with a single sentence: "For the purpose of pending litigation, which looks to ultimate judgment and recovery, such value [of the attached insurance policy] is its face amount and not some abstract or hypothetical value."¹⁰⁵ The court thus implicitly held that the only obligation which has any determinative worth is the duty to indemnify, the value of which is the maximum indemnification obtainable under the terms of the policy. But the monetary limit

policy is used as a sufficient basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy. In other words, the promise to defend the insured is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue. 'This is a bootstrap situation.'

¹⁰⁰ See note 22 *supra* and accompanying text. See, e.g., *Mexico v. Schmuck*, 294 N.Y. 265, 62 N.E.2d 64 (1945); *Benadon v. Antonio*, 10 App. Div. 2d 40, 197 N.Y.S.2d 1 (1960), *modified on other grounds*, 10 App. Div. 2d 929, 205 N.Y.S.2d 800 (1960); *Davidoff v. Chipornoi*, 101 Misc. 291, 166 N.Y.S. 996 (Sup. Ct. 1917). New York has incorporated this traditional limitation into statutory form: "Where jurisdiction in the action was based upon a levy upon property or debt pursuant to an order of attachment, the execution shall also state that fact, describe all property and debts levied upon, and direct that only such property and debts be sold thereunder." N.Y. CIV. PRAC. LAW § 5230(a) (McKinney 1963).

¹⁰¹ 17 N.Y.2d at 113, 216 N.E.2d at 314, 269 N.Y.S.2d at 101.

¹⁰² Under the terms of the policy the insurer agreed: "2. Upon receipt of notice of loss or damage caused to persons or property, to serve any person insured by this policy by such investigation thereof, or by such negotiations with the claimant, or by such settlement of any resulting claims, *as may be deemed expedient by the Insurer . . .*" Brief for Defendant-Appellant at 10 (emphasis added).

¹⁰³ See *Willard v. Butler*, 31 Mass. (14 Pick.) 550 (1834); *Wrigley v. Geyer*, 4 Mass. 101 (1808); *Weil v. C.H. Tyler & Co.*, 38 Mo. 545 (1866).

¹⁰⁴ 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1968).

¹⁰⁵ *Id.* at ____, 234 N.E.2d at 671, 287 N.Y.S.2d at 637.

on the duty to indemnify is just that—a limit and *not* a liquidated amount. The amount of the default judgment under the *Pennoyer* system must be limited to, and consequently determined by, the value of the attached property. Yet, the value of the property attached — the obligation to indemnify — cannot be determined until judgment is rendered. Instead of the value of the attached property placing a ceiling on the in rem judgment, the judgment determines the value of the property.¹⁰⁶ Anticipating objections, the *Simpson* court declared that “[i]t is . . . hardly necessary to add that neither the *Seider* decision nor the present one purports to expand the basis for in personam jurisdiction in view of the fact that the recovery is necessarily limited to the value of the asset attached; that is,

¹⁰⁶ The valuation problem theoretically should arise prior to judgment. Under N.Y. CIV. PRAC. LAW § 6214(a) (McKinney 1963), the levy of attachment is accomplished upon the garnishee. However, the statute requires that within 90 days after levy is made by service of the order of attachment, the thing attached must be taken into actual custody by the sheriff or the levy shall become void. N.Y. CIV. PRAC. LAW § 6214(e) (McKinney 1963). Initiation of a special proceeding against the garnishee to compel payment, delivery, or transfer to the sheriff of such property or debts will avoid the 90-day perfection requirement. Likewise, upon motion of the plaintiff, the court may issue an order extending the 90-day period. *Id.* Referring to this required seizure, § 6214(c) provides that “[w]here property or debts have been levied upon by service of an order of attachment, the sheriff shall take into his actual custody all such property capable of delivery and shall collect and receive all such debts.” N.Y. CIV. PRAC. LAW § 6214(c) (McKinney Supp. 1967). The valuation problem is thus presented well before entry of judgment. The statutory mandate is clear that the sheriff shall collect and receive all attached debts. In a subsequent stage of the *Seider* litigation, the Appellant Division simply avoided the valuation problem by granting plaintiff's motions to extend the time period for perfection until 90 days before the entry of final judgment. *Seider v. Roth*, 28 App. Div.2d 698, 699, 280 N.Y.S.2d 1005, 1006 (1967). A direct appeal to the Court of Appeals from an order of the Special Term, Supreme Court, New York County requiring an insurer-garnishee in a *Seider*-type attachment to turn over the “proceeds of the policy” to the sheriff within 10 days after service of a default judgment against the insured-defendant was dismissed on the ground that the order appealed from was not final. *Victor v. Lyon Associates, Inc.*, 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967); see Brief for Garnishee-Respondent-Appellant, *Victor v. Lyon Associates, Inc.*, 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967). The obvious question, what are the “proceeds of the policy” was apparently answered by the Court of Appeals in *Simpson v. Loehmann*, when it stated that the value of the asset attached, *i.e.*, the policy, is “its face amount and not some abstract or hypothetical value.” 21 N.Y.2d 305, 234 N.E.2d 669, 671, 287 N.Y.S.2d 633, 637 (1968). The court offered no explanation for this valuation; indeed, there is none. The choice was arbitrary. At this stage of the litigation, there has been no judgment nor is it certain that there will be a judgment. Therefore, the so-called face amount of the policy is nothing more than a limit on the insurer's contractual obligation to indemnify the insured for a judgment which might be rendered against him. See generally Seigel, *Practice Commentary*, N.Y. CIV. PRAC. LAW §§ 5201 & 6214 (McKinney Supp. 1967).

the liability insurance policy."¹⁰⁷ However, when the sum demanded in the plaintiff's complaint determines the size of the default judgment and consequently the value assigned by the court to the attached "debt," the procedure takes on the characteristics of jurisdiction in personam.¹⁰⁸

The complexities involved in the application of the New York attachment law in the *Seider* procedure are further illustrated by supposing that subsequent to commencement of the quasi in rem action in New York, the *Seider* plaintiff institutes a new action in personam against the defendant in Vermont where the accident occurred or in any other state where the defendant is subject to personal jurisdiction.¹⁰⁹ Under the *Seider* decision, the insurer's duty to defend is an element of the bundle of obligations composing the attached "debt," and CPLR section 6214(b) forbids a garnishee from paying over or otherwise disposing of such a debt."¹¹⁰ Therefore, it would seem that the insurer is enjoined by the New York levy of attachment from providing its insured with a defense, admittedly due, in the Vermont suit.¹¹¹ Furthermore, it seems highly probable that the insured-defendant will not risk an appearance in New York to defend on the merits,¹¹² since the plaintiff's claim is for an amount far in excess of the

¹⁰⁷ 21 N.Y.2d 305, 234 N.E.2d 669, 671, 287 N.Y.S.2d 633, 637 (1968).

¹⁰⁸ See Seigel, *supra* note 106, at § 5201. If the sum demanded in the complaint were equal to or less than the policy limit, there would be virtually no difference between the quasi in rem procedure and a proceeding with full personal jurisdiction over the defendant. See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 950 (1960) [hereinafter cited as *Developments—Jurisdiction*].

¹⁰⁹ See note 39 *supra* and accompanying text. A subsequent in personam action was brought by the plaintiffs in *Victor v. Lyon Associates, Inc.*, 21 N.Y.2d 691, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967). In that case the plaintiff, an American serviceman, was injured in a motor vehicle accident in the streets of Saigon, South Vietnam, through the alleged negligence of an employee of the defendant Maryland corporation. The plaintiff brought suit in New York by attaching the obligations owed by the insurer, a national insurance company doing business in New York, to the Maryland defendant. Subsequent to commencement of the quasi in rem action in New York, the plaintiff instituted a new action in personam against the defendant corporation in Maryland, the state of its incorporation and principal place of business. See letter from Peter J. Malloy, Jr. of the firm of Lee, Muldering & Celetano to Raymond J. Cannon, Clerk of New York Court of Appeals, Oct. 31, 1967.

¹¹⁰ N.Y. CIV. PRAC. LAW § 6214(b) (McKinney 1963).

¹¹¹ But see Seigel, *Practice Commentary*, N.Y. CIV. PRAC. LAW § 5201, at 14-15 (McKinney Supp. 1967). Professor Seigel suggests that the New York courts can relieve the insurer of this "injunction" by construing the obligation to defend as "arising independently in each action brought based upon the same accident, with the result that the 'freezing' of the obligation to defend in one action would have no effect on it in a different one." *Id.*

¹¹² See notes 147-48 *infra* and accompanying text.

policy limit.¹¹³ If the Vermont court proceeds to judgment in personam before a default judgment is rendered in New York, a plea of res judicata will be available to the defendant in the New York action.¹¹⁴ However, should the New York default judgment be rendered for the amount of the policy limit prior to final judgment in Vermont, as will probably be the case, the only effect on the in personam action will be to allow the defendant to set off the value of the policy seized in the quasi in rem proceeding against any personal judgment the Vermont court might grant.¹¹⁵ The Vermont personal judgment might well be for an amount somewhat less than the policy limit. In that case the New York quasi in rem judgment will have taken property of the garnishee in excess of the real value of the asset attached — the obligation to indemnify as determined by litigation on the merits — and thus will have violated the intent of a New York statutory provision limiting quasi in rem judgments to the value of the attached "debt."¹¹⁶ Similarly, if the Vermont court should find for the defendant on the merits and give the plaintiff no recovery, there should have been no obligation to indemnify and thus no "debt" to be attached by the New York court.

In addition to these theoretical difficulties, hard questions can be anticipated by supposing that after action has been commenced in New York by attachment, the insured is sued personally in another jurisdiction by another plaintiff injured simultaneously in the same accident. If a plaintiff obtains a personal judgment against the defendant and seeks execution out of the attached policy before the New York court renders a default judgment, under *Seider* it would seem that the attachment will forbid the insurer from fulfilling its contractual obligation to pay under the policy.¹¹⁷ As a consequence, a judicial preference would be created for plaintiffs who proceed by actions quasi in rem over those who sue where personal jurisdiction can be obtained. Taking the *Seider* reasoning one step further, if the policy which the injured plaintiff was trying to reach for execution of his personal judgment had been attached in New York by a general

¹¹³ In *Victor v. Lyon Associates, Inc.*, 21 N.Y.2d 691, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967), the plaintiff's claim was for \$750,000 while the policy limit was \$20,000. Brief for Garnishee-Respondent-Appellant at 3, *Victor v. Lyon Associates, Inc.*, 21 N.Y.2d 691, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967). See note 109 *supra*.

¹¹⁴ See RESTATEMENT OF JUDGMENTS § 47 (1942).

¹¹⁵ See note 149 *infra*.

¹¹⁶ See note 100 *supra*.

¹¹⁷ See N.Y. CIV. PRAC. LAW § 6214(b) (McKinney 1963).

creditor of the insured, the plaintiff who sued where he could obtain personal jurisdiction will have his claim to the proceeds of the policy subordinated to the alert creditor who keeps up with his debtor's traffic record. Such is only the expected result of what the New York Court of Appeals considered to be a logical extension of jurisdiction based upon the attachment of intangibles.

CONSTITUTIONAL ISSUES

The basic thrust of the *Seider* opinion largely concerned the question of whether the intangible property which the plaintiff purported to attach did, in fact, exist.¹¹⁸ Assuming *arguendo* that a "debt" is fictionally "present" in New York, under the *Pennoyer* rules the New York court would constitutionally have "power" to adjudicate the dispute, jurisdiction being based upon the existence of a contractual relationship between the nonresident defendant and a corporation which does business in all fifty states, including New York. However revolutionary the result may seem, it is simply the product of the *Pennoyer* reverence for the fictional res. Nevertheless, considered in light of *International Shoe-Atkinson* principles, ramifications of a serious constitutional dimension may be created by New York's assumption of jurisdiction — by attachment of a fictional res — to adjudicate a claim against a nonresident defendant which arose out of events occurring in another state.

Denial of Due Process to Defendant-Insured

Judgments in actions quasi in rem have, as noted above, traditionally been limited to the value of the defendant's property attached within the state.¹¹⁹ As the concept of exclusive territorial jurisdiction has crumbled in the wake of *International Shoe*¹²⁰ and as the reach of personal service

¹¹⁸ Indeed the complexity of the *Seider* decision accurately reflects the extreme theoretical confusion which surrounds jurisdiction based on the attachment of intangibles. For a discussion of its problems see generally Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241 (1939); Beale, *The Exercise of Jurisdiction In Rem to Compel Payments of a Debt*, 27 HARV. L. REV. 107, 113-22 (1913); Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment and Taxation*, 31 HARV. L. REV. 905, 912-18 (1918); Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); Note, *Garnishment of Intangible Debts in New York—Its Past, Present and Future*, 6 FORDHAM L. REV. 283 (1937); Note, *The Requirement of Seizure in the Exercise of QUASI in Rem Jurisdiction: Pennoyer v. Neff Re-Examined*, 63 HARV. L. REV. 657 (1950).

¹¹⁹ See notes 22 & 100 *supra* and accompanying text.

¹²⁰ See notes 44-51 *supra* and accompanying text.

has been extended beyond the borders of the state,¹²¹ the theoretical necessity for this limitation has vanished; but the rule still persists. Its new justification appears to be that the court is restricting the liability of the nonresident defendant to the extent of his contact with the state, a rationale predicated upon a notion of adjusted fairness. Thus, since the attaching state may not otherwise be a very appropriate forum in which to require the defendant to litigate, the court will mitigate the unfairness to him by limiting his possible liability.¹²²

However, New York has by statute declared that this traditional limitation on actions quasi in rem will apply only to default judgments which result when a nonresident defendant fails to appear to defend the action on the merits.¹²³ If the defendant wants to defend on the merits, he may only do so by entering a general appearance, thereby "voluntarily" subjecting himself to the unlimited personal jurisdiction of the New York courts.¹²⁴ Indeed, the New York legislature, speaking through its Advisory Committee on Practice and Procedures, candidly admitted that the purpose of the statute was to provide a lever by which to obtain personal jurisdiction over nonresident defendants otherwise immune from suit in New York courts.¹²⁵ So long as the property attached could be said to have been present in the state at the direction of the defendant and the cause of action arose because of the presence of that property, such a statute would not seem violative of the *International Shoe-Hanson* "fair-

¹²¹ See note 52 *supra* and accompanying text.

¹²² See generally *Developments—Jurisdiction*, *supra* note 2, at 950 & n.261.

¹²³ See N.Y. CIV. PRAC. LAW § 320(c) (McKinney Supp. 1967). See generally Homburger & Laufer, *Appearance and Jurisdictional Motions in New York*, 14 BUFFALO L. REV. 374, 387-93 (1965).

¹²⁴ The argument was made in an English case that if the defendant "fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable." *In re Dulles' Settlement*, [1951] 1 Ch. 842, 850. Writing in support of this position, Professor Moore argues simply that "[t]he defendant cannot complain of inconvenience since he has already indicated a willingness to defend the merits." 2A J. MOORE, FEDERAL PRACTICE ¶ 12.13 (2d ed. 1966).

¹²⁵ See Fourth Preliminary Report of the Advisory Committee on Practice & Procedure (Legis. Doc. [1960] No. 20) 188, cited in *Lefcourt v. Sea Crest Hotel & Motor Inn, Inc.*, 54 Misc. 2d 376, 282 N.Y.S.2d 896 (Sup. Ct. 1967); N.Y. CIV. PRAC. LAW § 320 (McKinney 1963) (remarks by compiler at 580); Brief for Am. Ins. Assoc. as Amicus Curiae, *Nationwide Mut. Ins. Co. v. Vange*, 265 F. Supp. 556 (S.D.N.Y. 1967).

ness" test. But where, as in *Seider*, an intangible "debt," over the location of which the defendant has no control, is attachable, the minimum contacts may not be present. If this is the case, New York may have put a price tag on the nonresident defendant's constitutional right to be immune from personal suit in a forum which does not have the constitutionally-required minimum contacts.¹²⁶ That price is the value of the defendant's property attached in New York and his constitutional right to defend that property against the plaintiff's claim.¹²⁷ In effect, New York has conditioned the exercise of one constitutional right upon the sacrifice of another.¹²⁸ The jurisdiction which New York purports to assert over nonresident defendants who choose to exercise their constitutional right to be heard in defense of their property can only be characterized as jurisdiction by coercion, the degree of coercion being measured by the value of the defendant's property within the state.¹²⁹

¹²⁶ See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). See also *Developments—Jurisdiction*, *supra* note 2, at 954.

¹²⁷ See, e.g., *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). See also *Developments—Jurisdiction*, *supra* note 2, at 954.

¹²⁸ In rejecting a plaintiff's motion to dismiss the defense that N.Y. CIV. PRAC. LAW § 320(c) denied due process of law to the defendant in a *Seider*-type proceeding, a New York supreme court said that "the 'debt' seized includes the carrier's obligations to investigate, to defend and to indemnify and that if judgment by default is permitted and those obligations are measured and paid over to plaintiff then, under CPLR 6204, the carrier 'is discharged from his obligation to the defendant' to investigate, to defend and to indemnify if plaintiff later sues in defendant's home state. Defendant is thus deprived, both in New York and in its home state, of the defense for which it contracted, unless it submits to personal jurisdiction in New York. Since the reasonableness and justice of such a procedure is open to question on the facts if not on the law, the defense insofar as it raises the issue of due process cannot be dismissed." *Lefcourt v. Sea Crest Hotel & Motor Inn, Inc.*, 54 Misc. 2d 376, 383-84, 282 N.Y.S.2d 896, 904 (1967).

¹²⁹ See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1139 n.38 (1966). The New York procedure presents the defendant with the dilemma of either abandoning the attached property or submitting to personal jurisdiction. Thus the presence of property within New York is made the basis of personal jurisdiction. See *Taintor, Foreign Judgment In Rem: Full Faith and Credit v. Res Judicata in Personam*, 8 U. PITT L. REV. 223, 229 (1942). But the concept of personal jurisdiction under duress is repugnant to the constitutional guarantee of due process. See *Ladew v. Tennessee Copper Co.*, 218 U.S. 357, 365 (1910); *Shuford v. Anderson*, 352 F.2d 755, 764-65 (10th Cir. 1965); *Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co.*, 285 F. 214 (6th Cir. 1922); *Grable v. Killits*, 282 F. 185 (6th Cir. 1922); *Cheshire Nat'l Bank v. Jaynes*, 224 Mass. 14, 112 N.E. 500 (1916).

Although constitutional arguments were not presented to the *Seider* court, prior reasons for abstention by the federal courts¹³⁰ were removed when the New York Court of Appeals later upheld the constitutionality of *Seider*. Thus, in a sharply divided opinion in *Simpson v. Loehmann*,¹³¹

¹³⁰ See *Nationwide Mut. Ins. Co. v. Vaage*, 265 F. Supp. 556, 562 (S.D.N.Y. 1967).

In *Vaage*, the insurance companies involved as garnishees in three *Seider*-type proceedings sought to challenge the constitutionality of *Seider v. Roth* before a three-judge federal court through a motion for interlocutory injunctions. The court did not consider the merits of the constitutional arguments advanced since (1) it could find no basis for injunctive relief within the purview of the three-judge court statutes (28 U.S.C. §§ 2281, 2284 (1964)), and (2) the injunctive relief sought by the insurance companies, *i.e.*, enjoining further proceedings in the New York courts, is specifically barred by the anti-injunction statute. 28 U.S.C. § 2283 (1964). The court indicated that even had these rules not deprived it of jurisdiction, the court would have been constrained by the abstention doctrine to refuse to take jurisdiction because the constitutional question had not been argued before the New York courts at any level.

¹³¹ 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). In *Lefcourt v. Sea Crest Hotel & Motor Inn, Inc.*, 54 Misc. 2d 376, 282 N.Y.S.2d 896 (1967), a New York supreme court had denied the plaintiff's motion to dismiss defenses of the defendant-insured which challenged the constitutionality of the *Seider* procedure under the Fourteenth Amendment, saying that "[s]ince the reasonableness and justice of such a procedure is open to question on the facts if not on the law, the defense insofar as it raises the issue of due process cannot be dismissed." *Id.* at 384, 282 N.Y.S.2d at 904. However, the New York Court of Appeals in *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), upheld the constitutionality of *Seider v. Roth* in a 4-3 decision that produced four separate opinions. Chief Judge Fuld, writing for the majority, summarily dismissed the arguments that the *Seider* attachment procedure imposes an undue burden on interstate commerce in the insurance field and impairs the obligations of the contract of liability insurance as having nothing to do with the case. *Id.* at , 234 N.E.2d at 670, 287 N.Y.S.2d at 635. Purporting to answer the argument that the *Seider* procedure violated the due process of the fourteenth amendment, he cited *Harris v. Balk* and stated: "And we perceive no denial of due process since the presence of that debt in this State . . . —contingent or inchoate though it may be—represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him." *Id.* at , 234 N.E.2d at 671, 287 N.Y.S.2d at 636. The Chief Judge then seemed almost to apologize for his decision by intimating that perhaps it was time for a reevaluation of the bases for jurisdiction in rem. But he added that this would be a task for the New York legislature. Taking a different tact, Judge Keating in a concurring opinion stated that *Seider v. Roth* is a "recognition of realities and not fictions" in holding that service of process on the insurer is a sufficient basis for jurisdiction because the insurer is the real party defendant. Under Keating's approach the only due process question was whether it was proper to compel the insurer to defend in New York. Judge Breitel, who replaced retired Chief Judge Desmond, author of the *Seider* opinion, reluctantly concurred in the result stating: "Only a major reappraisal by the Court, rather than the accident of a change in its

the New York court found that the *Seider* procedure satisfied the requisites established in *Harris v. Balk* for jurisdiction quasi in rem based upon the attachment of intangibles.¹³² However, in the 1968 decision of *Podolsky v. Devinney*,¹³³ the United States District Court for the Southern District of New York refused to follow *Simpson*, holding that the attachment procedure approved in that case deprived both the defendant-insured and the garnishee-insurer of property without due process of law. Rather than boldly questioning the jurisdictional system which produced this unconstitutional result, however, the district court arrived at its conclusion by finding that the intangible obligation attached in *Seider* was significantly distinguishable from the "simple" debt attached in *Harris v. Balk*. In deciding that the *Seider* procedure, in combination with the New York statute abolishing special appearances, effected a taking of the defendant's property without due process,¹³⁴ the *Podolsky* court reasoned that New York could not constitutionally assert personal jurisdiction over the defendant-insured under the minimum-contacts tests announced in *International Shoe*, even if New York statutes purported to allow it.¹³⁵ Under the New York statute,¹³⁶ however, any appearance by the defendant-insured to defend this action on the merits would constitute a "voluntary" submission to personal jurisdiction.¹³⁷ Since the defendant, by appearing and defending on the merits, might be found either not liable, or liable for an amount less than the policy limit which would be forfeited if he defaults, the defendant would be coerced into submission to personal jurisdiction which otherwise would be unobtainable and therefore he would be denied due process.¹³⁸ To avoid conflict with *Harris v. Balk*, the court then pur-

composition, would justify the overruling of that precedent [*Seider v. Roth*]." *Id.* at , 234 N.E.2d at 674, 287 N.Y.S.2d at 640. And thus *Seider v. Roth* was upheld, although a majority of the court disagreed with its holding, and *Simpson v. Loehmann* became a sacrifice to "stare decisis."

¹³² 21 N.Y.2d at , 234 N.E.2d at 671, 287 N.Y.S.2d at 636 (1967).

¹³³ 281 F. Supp. 488 (S.D.N.Y. 1968).

¹³⁴ See *id.* at 497.

¹³⁵ *Id.* at 496. "That conclusion [that New York could not assert personal jurisdiction] follows from the fact that the only nexus this litigation has with New York is the plaintiff's residence." *Id.*

¹³⁶ N.Y. CIV. PRAC. LAW § 320 (McKinney 1963).

¹³⁷ 281 F. Supp. at 495.

¹³⁸ *Id.* at 497. See generally *Developments—Jurisdiction*, *supra* note 2, at 965-66. Professor Carrington attacked quasi in rem proceedings in general as constituting an effort by the plaintiff to compel an appearance on penalty of forfeiture by a defendant who has "inadequate contact with the state to make him fairly answerable to the claim there . . ." Carrington, *supra* note 118, at 307.

ported to distinguish the attachment of a "simple" debt, such as that existing in *Harris*, from the *Seider* attachment of the "complicated composite of rights and obligations represented by an insurance contract."¹³⁹ In the court's view, jurisdiction based on the attachment of a "simple" debt as in *Harris* is somehow saved from the constitutional infirmity of the *Seider* procedure because an appearance by the defendant could not affect the value of that debt;¹⁴⁰ whereas the monetary value of the "debt" attached in *Seider*—the obligation to indemnify—is fixed solely by the amount of the plaintiff's judgment, which the defendant might well be able to influence by defending on the merits. The court apparently reasoned that the "simple choice [in the *Harris* case] of whether to forfeit this fixed amount and avoid in personam jurisdiction or defend the action and risk a judgment in excess of the value of the *res*"¹⁴¹ did not involve the coercion found to exist in the *Seider*-type proceedings.

However, the same coercion is seemingly present regardless of whether the attached property is a "simple" debt or the more complex insurer's obligation to defend and indemnify. By the terms of the policy, the insurer has limited its liability to a stipulated amount for each accident, regardless of the number or amount of judgments obtained.¹⁴² That limit also represents the value of the attached "debt" which will be forfeited to the plaintiff should the defendant-insured default.¹⁴³ An appearance by the defendant-insured which produced recovery for the plaintiff in an amount less than the policy limit would preserve for the defendant-

¹³⁹ *Id.* at 497.

¹⁴⁰ *See id.*

¹⁴¹ *Id.* In the *Seider* situation not only is the existence of the obligation to indemnify dependent upon a judgment being rendered against the insured, but also the value of that obligation is determined by the amount of the judgment. In this important respect, the *Seider*-type procedure differs from *Harris v. Balk*, 198 U.S. 215 (1905), where the debt was a fixed sum. The *Harris* Court determined that there was a debt owing to the nonresident defendant and then asserted jurisdiction to litigate a claim against the absent defendant by attaching that debt just as it would attach a local tangible belonging to the defendant. In *Harris* the debt was not in controversy; in *Seider* the so-called debt, *i.e.*, the obligation to indemnify, was inseparably tied to the controversy. Indeed, the very existence of the debt was to be determined by the outcome of the litigation. Appearance or default by the defendant in the *Harris* proceeding could have no effect on the attached debt. Yet, in the *Seider*-type litigation a defense on the merits might well establish that there is no debt, or that its value is somewhat less than the policy limit.

¹⁴² *See* E. PATTERSON & W. YOUNG, CASES AND MATERIALS ON THE LAW OF INSURANCE 704 (4th ed. 1961) (a typical automobile liability policy). *See generally* 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4891 (1962).

¹⁴³ *See* note 105 *supra* and accompanying text.

insured a right to the remaining amount of policy coverage in any subsequent actions arising out of the same accident.¹⁴⁴ Where the attached property is a "simple" debt as in *Harris v. Balk*, the defendant's basic choice is the same. If the defendant chooses to default, the garnishee's total obligation to the defendant, the fixed amount of the debt, will be forfeited to the plaintiff. And as in the *Seider* situation, an appearance and defense by the defendant might result in a judgment for less than the fixed amount of the debt, leaving the balance of the garnishee's obligation still owing to the defendant. Therefore, no relevant distinction seems to exist between the defendant's choice in *Harris v. Balk* and the insured's dilemma in the unconstitutional *Seider* procedure.

Denial of Due Process to Garnishee-Insurer

The *Podolsky* court held that, in addition to violating the constitutional rights of the defendant-insured, the *Seider* procedure also deprived the garnishee-insurer of property without due process of law.¹⁴⁵ While holding that the *Seider* attachment tended to coerce the defendant-insured to submit to personal jurisdiction, the *Podolsky* court admitted that actually "no knowledgeable insured would knowingly subject himself to the personal jurisdiction of a court where the amount which might be recovered could exceed the limits of his insurance coverage."¹⁴⁶ Because the claims in these actions were so greatly in excess of the limits of the attached policies,¹⁴⁷ the insured defendants might quite understandably decide that it is in their best interest to sacrifice a default judgment against the attached liability policy rather than expose themselves to the notoriously high New

¹⁴⁴ If the subsequent action is brought by the same plaintiff, the defendant will also be able to apply against any judgment that might be rendered the amount already obtained by the plaintiff in the New York action. See note 149 *infra* and accompanying text.

¹⁴⁵ 281 F. Supp. at 500.

¹⁴⁶ *Id.* at 498.

¹⁴⁷ See, e.g., Brief for Garnishee-Respondent-Appellant at 3, *Victor v. Lyon Assoc., Inc.*, 21 N.Y.2d 691, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967) (complaint demands damages of \$750,000, policy limit is \$20,000); Brief for Defendant-Appellant at 4, *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 312 (1966) (order authorized attachment of assets of defendant up to sum of \$140,000). See also Brief for Am. Mut. Ins. Alliance as Amicus Curiae at 2, *Nationwide Mut. Ins. Co. v. Vaage*, 265 F. Supp. 556 (S.D.N.Y. 1967). The large discrepancy in the policy limit and the sum demanded in the complaint suggests that the plaintiff is using the attachment as a handle to obtain personal jurisdiction otherwise unavailable. See *Developments—Jurisdiction*, *supra* note 2, at 954.

York personal injury verdicts.¹⁴⁸ Furthermore, should the plaintiff later sue in a forum where the defendant is subject to full personal jurisdiction, the defendant will be able to apply against any subsequent judgment the amount already obtained by the plaintiff in the New York action.¹⁴⁹ In light of this practical observation, the distinction emphasized by the district court between a "simple" debt and the more complex obligations of the insurer assumes new significance. Where the attached intangible is a conceded debt, the litigation affects the garnishee only collaterally by determining to whom the fixed debt is payable. But because of the conditional nature of the "debt" attached in the *Seider* action,¹⁵⁰ there would seem to exist a right in the garnishee insurance company to contest the "debt" by appearing and putting the plaintiff to his proof.¹⁵¹ It is accepted, however, that the insurer's appearance to defend an action against its insured constitutes a general appearance by the insured himself.¹⁵² This rule, coupled with the attachment of a nonresident's liability insurance policy and New York's denial of limited appearance, drives a wedge be-

¹⁴⁸ See *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 675, 287 N.Y.S.2d 633, 641 (1967) (concurring opinion).

¹⁴⁹ See RESTATEMENT OF JUDGMENTS § 34, comment g; 36, comment b (1942). See also *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 834 (1952). Although existing authority is to the contrary, Professor Carrington contends that when a plaintiff seeks to recover the balance of his claim in a second jurisdiction after securing a default judgment in an action quasi in rem, the defendant should be able to plead res judicata. Thus, multiple litigation could be avoided by "requiring the plaintiff to resolve his dispute whole in one lawsuit . . . [I]f the defendant is entitled to only one day in court, the plaintiff should be entitled to only one also." Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 315-16 (1962).

¹⁵⁰ See notes 90-99 *supra* and accompanying text.

¹⁵¹ See 6 AM. JUR. 2d *Attachment and Garnishment* § 358 (1963). *Harris v. Balk*, 198 U.S. 215 (1905), where attachment of debts was established as a valid basis for jurisdiction, involved a conceded debt and the garnishee's only interest in the litigation was in determining to whom the debt was owing. But in the *Seider*-type proceeding neither the amount nor even the existence of the "debt" is conceded. Under the *Harris v. Balk* decision, the garnishee should have available to him all defenses which the defendant could raise against the plaintiff. Thus, the garnishee would seem to have a right to full adjudication on the merits.

¹⁵² See, e.g., *Braunstein v. Phillips*, 115 N.Y.S.2d 47, 48 (Sup. Ct. 1952). See also Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 567 (1967); Brief for Am. Ins. Ass'n as Amicus Curiae at 10, *Nationwide Mut. Ins. Co. v. Vaage*, 265 F. Supp. 556 (S.D.N.Y. 1967); Brief for Am. Mut. Ins. Alliance as Amicus Curiae at 14, *Nationwide Mut. Ins. Co. v. Vaage*, 265 F. Supp. 556 (S.D.N.Y. 1967); Brief for Plaintiff-Respondent at 7, *Victor v. Lyon Assoc., Inc.*, 21 N.Y.2d 691, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967).

tween the normally identical interests of the insured and the insurer in defending the suit. Insured defendants in the *Seider* line of cases have responded by giving explicit instructions to their insurers not to appear or otherwise subject them to personal jurisdiction in New York.¹⁵³ Such instructions should be sufficient to revoke any authority the insurer, as agent of the defendant-insured, might have been presumed to have had to make such an appearance.¹⁵⁴ Even absent such specific instructions the insured could not, consistent with its fiduciary duty to its assured, expose the insured to personal liability in excess of the policy limits.

Running counter to the revocation of authority theory is the argument that the insured has voluntarily surrendered the right to choose between appearance and default by signing the insurance contract,¹⁵⁵ and that the insurer therefore has a contractual right to appear for the insured and defend on the merits. However, if the insured is bound by the terms of the policy either to appear at the request of the insurer or to allow his insurer to appear for him, then the attachment of the insurance policy of a nonresident defendant creates a *de facto* form of personal jurisdiction which must meet constitutional minimum contacts standards.¹⁵⁶

To compromise this dilemma by permitting the insurer in a *Seider*-type procedure to defend on the merits without subjecting the insured to personal jurisdiction would in effect sanction limited appearances, which the New York statute specifically abolished. A choice must, therefore, be made between the insured's right to immunity from personal jurisdiction of the New York courts and the insurer's contract right to conduct a defense. The more acceptable solution would seem to allow the insured to remain immune from personal jurisdiction. Since the insurer cannot

¹⁵³ See, e.g., Brief for Am. Ins. Ass'n as Amicus Curiae at 10, *Nationwide Mut. Ins. Co. v. Vaage*, 265 F. Supp. 556 (S.D.N.Y. 1967); Brief for Am. Mut. Ins. Alliance as Amicus Curiae at 16, *Victor v. Lyon Assoc., Inc.*, 21 N.Y.2d 691, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967).

¹⁵⁴ See Seigel, *Practice Commentary*, N.Y. CIV. PRAC. LAW § 5201, at 14 (McKinney Supp. 1967).

¹⁵⁵ The automobile liability policy typically states: "The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in conduct of suits." 4 W. FREEDMAN, *RICHARDS ON THE LAW OF INSURANCE* 2042, 2050 (5th ed. 1952). See Brief for Plaintiff-Respondent, *Victor v. Lyon Assoc., Inc.*, 21 N.Y.2d 691, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967). See generally 19 STAN. L. REV. 654 (1967).

¹⁵⁶ See generally Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); 19 STAN. L. REV. 654 (1967).

compel the insured, over his objection, to accept a defense which could subject him to personal liability beyond the limits of the policy, neither can it force the insured to encounter the same risks by personally appearing. Moreover, it seems highly improbable that a court would construe the policy's cooperation clause as requiring the insured to expose himself to the same risk of direct liability.¹⁵⁷

AFTERMATH OF SEIDER

Podolsky's supposed distinction between the "simple debt" in *Harris* and the *Seider* intangible insurer's obligation can only be a short-run solution, if it is a solution at all. The *Seider* result itself graphically illustrates the risks attendant to continued reliance on the idea that all jurisdictional problems can be solved by the mechanical distinction prescribed by *Pennoyner* between jurisdiction in personam and jurisdiction in rem. Even though *Seider* failed to recognize it, a shift away from the *Pennoyner* theories has begun,¹⁵⁸ sparked by the Supreme Court's recognition in *International Shoe* that the purpose of a jurisdictional test is to determine if adjudication of the particular controversy within a particular forum will accord fundamental fairness to the defendant. While the *International Shoe* Court was speaking of personal jurisdiction, the same purpose, and therefore the same jurisdictional test, would seem to apply to in rem jurisdiction, since the object of both actions is a determination of the defendant's legal interests.

Recognizing that this purpose was not being served by the traditional method of assigning a fictional location to a fictional res, Justice Traynor,

¹⁵⁷ See 281 F. Supp. at 499.

¹⁵⁸ In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Supreme Court, speaking of the due process notice requirement, stated: "[W]e think that the requirements of the Fourteenth Amendment . . . do not depend upon a classification [of an action as either in rem or in personam] for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." 339 U.S. at 312. This was implicit judicial recognition that regardless of the label, the object and net effect of all judicial action is to adjudicate the legal interests of persons.

See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-36. See also Traynor, *Is This Conflict Really Necessary?* 37 TEX. L. REV. 657 (1959).

Holmes, J., in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 76 (1900), stated: "If the technical object of the suit is to establish a claim against some particular person . . . or to bar some individual claim or objection . . . the action is in personam, although it may concern the right to, or possession of a tangible thing. . . ." Once this is fully realized, the logical inconsistency of applying two different jurisdictional tests becomes apparent.

in *Atkinson v. Superior Court*,¹⁵⁹ founded jurisdiction over a nonresident defendant on the attachment of an intangible obligation only *after* deciding that the *International Shoe* interpretation of due process had been satisfied. The attached intangible¹⁶⁰ was the subject matter of the litigation, and the action arose out of the transaction which constituted the nonresident defendant's contact with the state as required by *International Shoe*.¹⁶¹ In contrast, the plaintiff's cause of action in *Seider* arose out of a transaction occurring outside the forum state. Further, the nonresident defendant's contact with the forum state did not give rise to the cause of action,¹⁶² but stemmed only from the fact that his Connecticut insurer happened to do business in New York. The expectations of the defendant as to where he could have reasonably anticipated being subject to suit, a relevant consideration in determining fairness of the forum,¹⁶³ could hardly have included New York. Thus, it would be difficult to characterize the defendant's contact with New York as an act by which he "purposefully avails [himself] . . . of the privilege of conducting activities within the forum State"¹⁶⁴ and for which he could reasonably expect to be answerable in that state. The fact that the defendant's insurance policy was issued by a company doing business in New York, as well as in forty-nine other states, seems to be slender justification for compelling the defendant to enter New York to defend. The only other contact which New York had with the accident, which was the subject matter of the litigation, was that the plaintiff was domiciled in that state. While a state does have an interest in ensuring that the claims of its citizens receive proper judicial resolution, such protection should not be afforded at the expense of non-

¹⁵⁹ 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958). See notes 64-69 *supra* and accompanying text.

While the procedural situation in *Atkinson* differs from *Seider*, Traynor ruled that the distinction "between jurisdiction to take over a nonresident's claim to a chose of action admittedly his [*i.e.*, *Seider*] and jurisdiction to establish that it was never his [*i.e.*, *Atkinson*]" had no relevance to the determination of whether fairness requirements of the due process clause were met in a suit commenced by attachment of that chose in action. *Id.* at 346, 316 P.2d at 965. "In both situations the nonresident can protect his interest in the property only by submitting to the jurisdiction of the court." *Id.*

¹⁶⁰ The "property" attached in *Atkinson* was the contractual obligation of the plaintiffs' employers to make payments to the nonresident defendant.

¹⁶¹ See notes 50-51 *supra* and accompanying text.

¹⁶² *Id.*

¹⁶³ See *Developments—Jurisdiction*, *supra* note 2, at 965.

¹⁶⁴ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). See notes 51, 60-62 *supra* and accompanying text.

residents whose only connection with the state was the fortuity of their injuring a New York resident. In terms of the *International Shoe* interest analysis, New York was simply not an appropriate forum in which to litigate this controversy.¹⁶⁵

CONCLUSION

The *Podolsky* pronouncement that adjudicative authority cannot be based constitutionally on the attachment of a liability insurer's obligation to defend and indemnify may well be the first step in a piecemeal abandonment of jurisdiction quasi in rem. In effect, the district court utilized the interest analysis approach espoused in *International Shoe* to determine that the result reached in the *Seider* application of quasi in rem jurisdiction was unconstitutional. While the court then felt constrained to adjust the system of concepts underlying jurisdiction quasi in rem so that it might be rationalized with that conclusion, this procedure only substantiates Professor Hazard's observation that "[a] system of legal concepts, however inelegant, can easily persist beyond the point when it produces or invites bad results—these can be avoided by decisional manipulation."¹⁶⁶ *Seider v. Roth* is simply the product of a jurisdictional system which insists on retaining the *Pennoyer* concept of categorical differentiation between jurisdiction in rem and jurisdiction in personam even though the theoretical justification for the distinction no longer exists. Consequently, as long as courts continue to approach the jurisdictional inquiry as a search for the ever-elusive res, the basic consideration of fundamental fairness will remain obscured.¹⁶⁷

Conceivably, the task of assuring an appropriate forum for litigation might be delegated to the common law doctrine of *forum non conveniens*, which is unhampered by the mythology of power and sovereignty.¹⁶⁸ Most states, however, are reluctant to apply the doctrine to quasi in rem actions because it relies upon the supposition that the defendant is subject to

¹⁶⁵ See Seigel, *Practice Commentary*, N.Y. CIV. PRAC. LAW § 5201, at p.20 (McKinney Supp. 1967).

¹⁶⁶ Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 243.

¹⁶⁷ See Traynor, *Is This Conflict Really Necessary?* 37 TEX. L. REV. 657, 663 (1959).

¹⁶⁸ Professor Carrington argues that when a plaintiff can find no basis for personal jurisdiction over the defendant, the convenience of the parties and witnesses and the interests of justice in most cases will be well served by application of the doctrine of *forum non conveniens*. Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 311 (1962).

service of process in at least two forums, whereas attached property normally can exist in only one.¹⁶⁹ But this logic breaks down with respect to intangibles, for such property can theoretically exist in every jurisdiction in which the insurer or debtor is doing business. Nonetheless, state court application of *forum non conveniens* is discretionary,¹⁷⁰ and the rule in New York is that if the plaintiff is a domiciliary of New York at the time of action, he may as a matter of right prosecute his action in the New York courts, assuming he can acquire jurisdiction over the defendant.¹⁷¹ Such a rule precludes any consideration of fairness to the defendant, the essential determinant of jurisdiction under *International Shoe*.

Justice Traynor contends that as the distinction between jurisdiction in personam and in rem is abandoned, the tests of jurisdiction and *forum non conveniens* will converge and will absorb the choice-of-law tests. The result will be litigation in the state whose law controls the controversy and whose courts are best qualified to interpret and apply it.¹⁷² But essential to this proposition is the assumption that the American courts will discard the *Pennoyer* dichotomy of jurisdiction. This abandonment can occur only when the courts are willing to "give up the ghost of the res"¹⁷³ and squarely face the reality that every judicial action is an adjudication of personal rights, and that the traditional notions of fairness and substantial justice espoused in *International Shoe* cannot be denied a defendant simply because the action against him is denominated in rem.

¹⁶⁹ See 51 MINN. L. REV. 158, 163 (1966).

¹⁷⁰ See generally F. JAMES, CIVIL PROCEDURE § 12.17 (1965); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

¹⁷¹ See Seigel, *Practice Commentary*, N.Y. CIV. PRAC. LAW § 5201, at pp. 25-26 (McKinney Supp. 1967).

¹⁷² See Traynor, *supra* note 166, at 663-64.

¹⁷³ *Id.* at 663.

